

**FEDERAL GUARANTEED LOANS FOR INDIAN HOUSING**©  
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**Introduction**

Title VI and Section 701 of Title VII of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA") provide two useful federal guarantee loan programs for Indian Housing. Title VI is an entirely new program authorizing HUD to guarantee notes and other obligations issued by tribes<sup>2</sup> or their designated housing entities. Section 701 of Title VII amends the existing Indian Housing Guarantee Loan program under Section 184 of the Housing and Community Development Act ("Section 184"), primarily by making tribes eligible borrowers and by permitting Ginnie Mae to issue mortgage-backed securities covering the guaranteed obligations.

Because the applicable regulations are not yet final . . . or even published, for that matter<sup>3</sup>. . . we do not know the regulatory parameters of the two loan guarantee programs, let alone the practical parameters. However, together, these two programs--one old, one new--offer tribes, tribal families, and tribal housing entities a number of formidable, flexible financing options.

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<sup>2</sup> Tribes eligible to participate in this program are primarily federal tribes, as defined in NAHASDA; however, some state tribes meet the NAHASDA definition in section 4(12)(c) and are also eligible.

<sup>3</sup> Even though the Negotiated Rule-Making Committee finished its proposed regulations on May 1, HUD had not published the regulations for comment even by July 1!

## **Title VI**

Title VI of NAHASDA authorizes HUD to guarantee the "notes and other obligations" issued by Indian tribes or tribally designated housing entities ("TDHEs")<sup>4</sup> to pledge the full faith and credit of the United States to the payment of such guarantees. This guarantee decreases a lender's risk, thereby lowering the cost of the loan and greatly enhancing a tribe's ability to borrow money for financing affordable housing activities. Such guarantee is available only if a tribe has tried unsuccessfully to borrow without a guarantee, and only to the extent that the borrowed amount does not exceed five times the amount of the tribe's grant approval.

The loan guarantee process begins with a borrower and lender agreeing on the basic terms of a loan: amount, security, term of loan, interest rate, and so forth. The documents are then negotiated between the borrower and the lender and address the details of the transaction, including events of default, available remedies, jurisdiction, and enforcement options. HUD will not commit to a guarantee until it reviews the loan documents to determine, among other things, whether the documents are enforceable in the event of default. The lender, or HUD in the event of a call on the guarantee, must be able to enforce compliance, in court or otherwise. Without that ability, the lender will not lend, and HUD will not guarantee.

NAHASDA itself describes generally the terms and conditions (for example, the term,<sup>5</sup> security,<sup>6</sup> and repayment sources<sup>7</sup>) of loans that HUD can be expected to guarantee; however, the final

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<sup>4</sup> While both tribes and TDHEs are eligible for this loan program, I have referred throughout the section simply to "tribes" in order to avoid cumbersome and repetitive language.

<sup>5</sup> NAHASDA allows--but does not require--HUD to refuse to guarantee a note with a term longer than 20 years. The proposed regulations specify that "the repayment period may exceed 20 years if such period is commercially reasonable or an industry standard."

<sup>6</sup> One of the obstacles to on-reservation lending has always been the trust status of tribal lands. Lenders expect to be able to foreclose on the borrower's property if the borrower defaults; however, because trust land can't be sold, lenders can't foreclose on it in the event of default. The use of leasehold mortgages is one way of getting around this problem. It allows the lender to, in effect, become the tenant on the land for a period of time, and to rent the land or the facility or business on the

regulations will be key in fleshing out the nature and scope of the guaranteed loans. Ultimately, the final responsibility for the quality and enforceability of the loan terms and conditions will be the lenders. Lenders who are careless about negotiating loans may find that HUD refuses to guarantee the loans; as a result, lenders can be expected to insist upon precise terms and adequate certifications and documentation.

The regulations as proposed would allow the loans to be sold on the secondary market, and encourage tribes to ". . . explore creative financing mechanisms, including but not limited to borrowing from private or public sources or partnerships, issuing tax exempt and taxable bonds where permitted, establishing consortiums or trusts for borrowing or lending, or for pooling loans . . . ." The potential is very exciting, as tribes themselves can lend with greater confidence, borrow more easily and at more favorable rates,<sup>8</sup> leverage their grant funds and other income, and in general participate in more sophisticated financing schemes that enable the tribes to maximize their housing dollars.

In a typical, simple borrowing scenario, the tribe would apply to a lender for a loan. The lender would then ask HUD if guarantee funds were available to cover that amount, and, if so, HUD would reserve the funds for a set period. The borrower and lender, in consultation with HUD, would negotiate the terms and conditions of the loan (including, presumably, making the loan conditional upon the lender's receiving the HUD guarantee) and would execute the certifications<sup>9</sup> and other transaction documents. The lender would then apply for and receive HUD's certificate of guarantee.

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land to make money. In this way the lender is protected, but, at the end of the lease, the land remains in the hands of the owner.

<sup>7</sup> Grant funds may be used for repayment of loans provided that the borrower has the ability to meet its obligations and to maintain the viability of its existing housing stock. Other sources of repayment security may be substituted, as long as the borrower and lender agree and HUD concurs.

<sup>8</sup> Banks like to make loans that are guaranteed to be repaid. For this reason, tribes can expect banks to be more co-operative and rates to be more competitive than would otherwise be the case.

<sup>9</sup> Such as certifications of legal authority, drug-free workplace, compliance with applicable regulations, etc.

The proposed regulations for Title VI are not lengthy. In addition to describing the procedure for applying for a loan guarantee, some of the more important regulations:

- describe what constitutes tribal approval to issue notes or other obligations;
- note how a tribe would demonstrate its unsuccessful efforts to obtain a loan;
- clarify the number of guarantees a tribe would be eligible to receive, and in what amounts;
- describe how a tribe's financial capacity would be demonstrated;
- specify the nature and scope of the terms of loan contracts, including provisions regarding security for loans, that HUD would be asked to guarantee;
- clarify questions about net interest costs;
- identify the reasons for HUD's partial or complete refusal to guarantee a loan; and
- require lender compliance with tribal laws.

Of course this guarantee program with such wonderful potential will be available only to the extent that Congress appropriates funds for the program. The National American Indian Housing Council ("NAIHC") is recommending \$32 million for the Title VI program.<sup>10</sup> However, as of early July, the Title VI program had not been funded, in part because the program is technical, unfamiliar, and not well understood yet, even by the tribes. In addition, OMB does not want to fund the Title VI program because, even though it could be tremendously useful to tribes that will receive small housing grant amounts, OMB does not think HUD knows how to supervise the program.

A response might be:

1. HUD can **learn** how to handle the program, either by training staff that handle the

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<sup>10</sup> It is unlikely that any funds appropriated will be adequate; more likely there will be a greater demand than supply. For this reason, NAHASDA limits the amount of guarantee any one tribe may receive in a fiscal year, and the proposed regulations recommend additional regional guarantee allocations.

current Section 184 or Section 108 loan guarantees, or by asking for assistance from, for example, the Small Business Administration, which handles more loan guarantee requests each month than NAIHA is recommending for the entire year.

2. The Title VI federal guarantee program offers a wonderful opportunity to generate on-reservation capital by providing a powerful incentive for banks, other private lenders, contractors, and tribal borrowing and lending consortiums to benefit from tribal/private sector partnerships and transactions. Isn't this a goal of Congress?

3. Because the Indian Housing grant funds will be divided between over 550 tribes and tribal entities, many of the smaller recipients will not receive enough money realistically to serve the needs of their community. The Title VI program will help such recipients leverage their inadequate amounts and obtain private funds and participation, increasing their practical ability to meet their community needs.

It would be short-sighted not to fund this program immediately and adequately. The great majority of tribes will not be allocated sufficient funds to address their housing needs and do not have gaming revenues available to supplement the federal funds received. Title VI offers one way in which to provide smaller and less wealthy tribes an opportunity to comply with their obligation to provide helpful governmental services. For this reason, Title VI is exciting. Without funding, however, Title VI does not even exist.

### **Section 701, Title VII**

Section 701 of Title VII of NAHASDA amends Section 184 of the existing Indian Housing Guarantee Loan program. The proposed NAHASDA regulations implement Section 701 and amend the existing Section 184 regulations currently in effect, though not dramatically.<sup>11</sup> Old and new Section

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<sup>11</sup> Most of the proposed revisions to the existing Section 184 regulations were made for clarity or consistency, or to reflect the amendments made by NAHASDA. The regulatory requirement that the lender and borrower comply with applicable tribal law is the only true exception to this, and its

184 regulations will be combined and renumbered, facilitating their use.

The primary changes that NAHASDA made to the existing Section 184 loan program were (1) to make the loan guarantees available for tribes (as well as for tribal individuals<sup>12</sup> and Indian Housing Authorities), (2) to allow HUD to decline an assignment of an obligation and security interest<sup>13</sup> and to allow mortgagees as well as HUD to liquidate an account in default,<sup>14</sup> and (3) to allow Ginnie Mae to issue mortgage-backed securities covering Section 184-guaranteed obligations.<sup>15</sup>

### **Conclusion**

One of the beauties of the two Indian housing loan guarantee programs is that they are available to serve not only tribes and tribal entities but also individual families. Another benefit is that monies borrowed and guaranteed can be used not only for building new homes, but also for renovating traditional structures, developing much-needed housing infrastructure, and financing other affordable housing activities.

A third benefit is that the two programs allow tribes an excellent access to private financial

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inclusion was intended to force individuals and lenders--who might not be aware of the tribal laws on encumbrancing or transfer of restricted land--to inquire into the existence of such laws, thereby decreasing the likelihood that their loan transaction will be frustrated by improper covenants.

<sup>12</sup> There is no requirement that such individuals qualify as low-income persons. However, individuals must be served by tribes or TDHEs with approved IHPs in order to qualify, and they must be able to certify that they lack access to private financial markets, absent the guarantee.

<sup>13</sup> It appears to be HUD policy to accept all assignments, but that is no longer required.

<sup>14</sup> NAHASDA and the proposed revised Section 184 regulations specify that liquidation may occur only after offering to transfer the account to "an eligible tribal member, the tribe, or the Indian housing authority [which in this context, by section definition, includes TDHEs] serving the tribe or tribes."

<sup>15</sup> This change, found in Section 701(k), amends section 306(g)(1) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1721(g)(1)).

markets, increasing their ability to borrow cheaply, to lend safely, to leverage limited tribal funds, and to invest in tribal communities, both locally and in other parts of the country. The possibilities are enormous, limited primarily by a tribe's imagination and need, federal appropriations, and a few encouraging regulations.

Although on-reservation lending transactions are not yet common events, this is primarily because lenders are not generally familiar with how to secure their loans and enforce their contracts. However, such transactions are quite achievable, and the incentive of a federal guarantee is likely to inspire many lenders to make a strong effort to become informed. Once they become knowledgeable about and comfortable with the loan documentation that is required for such transactions, we can expect to see a burst of on-reservation lending and economic development.